Unreasonable Search

Not quite 40 years ago, Justice Louis Brandeis wrote one of the most powerful and eloquent dissents in legal literature, contending that wiretapping constituted an unreasonable search of precisely the sort forbidden by the Fourth Amendment. He pleaded for an application of the Fourth and Fifth Amendments not in their literal terms but in their larger intent and design which, as he put it, "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

On Monday, a majority of the Supreme Court embraced this view. It concluded that a New York statute, authorizing eavesdropping under certain conditions seemingly analogous to those required for a valid search warrant, was "too broad in its sweep, resulting in a trespassory intrusion into a constitutionally protected area." The Court did not ban all eavesdropping as invalid; it simply said that the safeguards afforded by the New York statute were inadequate. In effect, however, the decision, as Mr. Justice Black said in dissent, "makes constitutional eavesdropping improbable."

It is the inherent character of electronic surveillance that creates the insuperable problem and makes such surveillance an "unreasonable search." True enough, as Mr. Justice Harlan noted in dissent, the New York statute "recognizes the applicability to eavesdropping of the Fourth Amendment's constraints." But the fact is that such constraints cannot effectively be applied as they can when a search is authorized for a specified physical object in a specified place. The dragnet character of electronic eavesdropping is its unforgivable and irremediable vice.

"By its very nature," Mr. Justice Stewart noted in a concurring opinion, "electronic eavesdropping for a 60-day period, even of a specified office, involves a broad invasion of a constitutionally protected area." It is a little like authorizing a search of a suspect's premises every day for two months in the hope that something might turn up or, as Mr. Justice Douglas suggested, like "placing a policeman in every home or office where it was shown that there was probable cause to believe that evidence of crime would be obtained." Such tactics might catch criminals but they would make life unendurable for decent men.

Tapping a telephone or bugging a room invades the privacy of innumerable unknown persons in addition to those who may be under suspicion. It subjects to audition all that they may say as well as what may be pertinent to a particular crime under investigation. It invites intolerable intrusion into the sanctity of the home and the sacred intimacies of family life. We think it is quite past any reasonable doubt that the Fourth Amendment was designed to forfend such intrusion—at least by any governmental authority in the United States.

Respect for the law as a principled protector of human freedom and the essential welfare of Americans will be enhanced by the Supreme Court's current, if long delayed, acceptance of this truth.

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